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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 270.

HENRY M. HALE AND GEORGIANA L. SCHELL, EXECUTORS OF THEODORE L. SCHELL, PLAINTIFFS IN ERROR,

vs.

STEPHEN AKERS AND MONTGOMERY AKERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED NOVEMBER 19, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 29, 1889.

a No. 8099.

In the Supreme Court of the State of California.

HENRY M. HALE *et als.*, etc., Appellants,
vs.
STEPHEN AKERS *et als.*, Respondents.

Transcript on Appeal (from Superior Court, Sonoma County).

William D. Bliss, att'y for appellants; Porter & Rutledge, att'ys for respondents.

Filed —— —, 1881. —— ——, clerk, by —— ——, deputy.

1 In the Supreme Court of the State of California.

Transcript on Appeal.

Complaint in the district court of the twenty-second judicial district in and for Sonoma county, California.

HENRY M. HALE and GEORGIANA L. SCHELL, Executors of the Will of Theodore L. Schell, Deceased, Plaintiffs,
vs.
STEPHEN AKERS and MONTGOMERY AKERS, Defendants.

The plaintiffs, as executors above named, complain of the defendants above named, and for cause of action allege—

That on the first day of January, 1876, one Theodore L
2 Schell was the owner, seized in fee of, and was in possession of that certain piece of land situated in Sonoma county, in the State of California, and a portion of the Huichica rancho, bounded and described as follows: Beginning at a point on the northerly line of the lane which runs from the dwelling-house of said Schell, westerly to the road leading from the Sonoma Plaza to the Embarcadero called "Montgomery street" or "Broadway," which place of beginning is distant 23.24 chains from the point of intersection of said lane and said road; thence north 50 deg. and 45 min. west along a fence 18.98 chains; thence south 37 deg. 15 min. west about 25 chains to a point on the northerly line of said lane, distant 3.63 chains easterly from the point of intersection aforesaid; thence north 78 deg. 30 min. east along said northerly line 19.61 chains to the place of beginning, containing eighteen and a half acres.

That said Theodore L. Schell was in his lifetime a resident of the city and county of San Francisco, and died therein on the fifteenth day of December, 1877.

That previous to his death he made a will, by which he appointed plaintiffs his executors; that said will was proved and admitted to probate in the probate court of said city and county on the twenty-sixth day of January, 1878; that on the same day letters testamentary were issued thereon by said court to plaintiffs; that thereupon

plaintiffs duly qualified and entered upon the discharge of
3 their duties as executors, and that they have ever since been and are now executors of the estate of said deceased.

That said Theodore L. Schell continued to be the owner, seized in fee of, and to be in possession of said premises up to the day of his death aforesaid; and that plaintiffs from the date of the issuance of the letters testamentary aforesaid up to the first day of August, 1879, continued to be in possession of said premises.

That on the first day of August, 1879, defendants entered into said premises against the will of plaintiffs and ousted plaintiffs therefrom.

That the fee of said premises is vested in the estate of said Theodore L. Schell, and these plaintiffs are entitled to the possession thereof.

That defendants still remain in possession of said premises without right.

Wherefore plaintiffs pray for judgment against defendants for the recovery of the possession of said premises with costs of suit.

WILLIAM D. BLISS,
Plaintiffs' Attorney.

Office in Petaluma.
Filed Aug. 22d, 1879.

Amended Answer.

In the Superior Court in and for the County of Sonoma, State of California.

(Title of cause.)

The said defendants, as an amended answer, by leave of the court first had and obtained, and as a supplemental answer, by
4 leave of the court first had and obtained, to the plaintiffs' complaint in said action brought in the twenty-second judicial district court of the State of California, in and for the county of Sonoma, deny each and every allegation in said complaint contained.

For another and separate defense defendant, Stephen Akers, alleges that the cause of action is barred by the provisions of section 318 of the Code of Civil Procedure.

For another and separate defense the said defendants allege that the cause of action is barred by section 319 of the Code of Civil Procedure.

And for a further and separate defense to said action the said defendants allege that the said defendant entered into possession of the premises more than twenty-five years before the commencement of this action, under claim of title, exclusive of other right, by a written conveyance thereof made and executed by the city of Sonoma, in Sonoma county, State of California, and that said city of Sonoma was then in possession thereof, claiming title thereto by virtue of the decree of confirmation by the board of land commissioners, dated January 22d, 1856, and by the judgment and decree of the United

States circuit court for the northern district of the State of California made and entered in said court on the 16th day of November, 1864, and that defendant, Stephen Akers, has been in possession thereof continuously, under and by virtue of said decree and conveyance, ever since the year 1858.

5 And, for a further and separate defense to said action, defendants allege that said defendant, Stephen Akers, is the owner in fee of said described lands and premises.

For a further and separate defense the defendants allege that on the 11th day of October, 1860, the defendant, Stephen Akers, entered into an agreement with Theodore L. Schell, the decedent named in the plaintiffs' complaint, whereby, for a valuable consideration then had and received from the said defendant, Stephen Akers, the said Schell, in writing, relinquished all his claim to said lands and premises to him, the said Stephen Akers, and did then acquiesce in and to the claim, title, possession, and right of possession of the said Stephen Akers.

And the said defendants, for a further and separate defense, allege that previous to the 11th day of October, 1860, and then and ever since, the city of Sonoma, in the said county of Sonoma, claimed the said lands as the pueblo lands of the said city, and which the said city claimed with other lands adversely to the said Theodore L. Schell, and was then and ever since has been prosecuting its claims before the land department of the Government of the United States, and that previous thereto the said city of Sonoma conveyed, by deed in writing, to the defendant, Stephen Akers, together with the lands and premises for the recovery of which this action is brought; and by virtue of the said conveyance from the said

6 city of Sonoma, as aforesaid, the said defendant, Stephen Akers, was on the said 11th day of October, 1860, in possession of all of said described premises, and claiming the same adversely to the said Schell.

And that at the time as aforesaid the defendant, Stephen Akers, claimed the said land and premises were within the pueblo lands of the said city of Sonoma as aforesaid, and that the said city of Sonoma would establish before the United States land department and before the Commissioner of the United States General Land Office its claim thereto.

And the said defendants and the said city of Sonoma then and ever since claimed that the pueblo extended on the southeast to the Arroyo Seco, and that the said Arroyo Seco formed the boundary line between the pueblo lands of the said city of Sonoma and the lands of the said Schell, whilst the said Schell then claimed that the Arroyo Seco did not form the boundary line as aforesaid, but extended beyond it on the north and included the lands of the said defendant, Stephen Akers.

That to settle the difficulties and avoid litigation the said defendant, Stephen Akers, and the said Schell made an agreement, a copy of which is hereto annexed and marked "Exhibit A" and made a part to this complaint, to await and abide the decision of the United States land department on the application of the said city of Sonoma

to have its title confirmed to its said pueblo lands; and the
7 said Schell did then agree to and with the said Stephen Akers that he, the said Schell, should never assert or claim any title or interest in or to the lands described in plaintiffs' complaint until it was determined by a decree of the said United States land department that the said city of Sonoma could not establish its said title thereto.

That the said defendant, Stephen Akers, for the purpose of avoiding litigation and to await and abide the decision of the said land department, delivered over to the said Schell other land within the pueblo of the said city of Sonoma, to the said Schell, to await said decision, and the said Schell then agreed that in the event the said city of Sonoma established its claim to any of said lands that he would forever release all claim of title or possession thereto and deliver up to said Stephen Akers all the lands claimed by said Akers within the said pueblo and pay to said Akers the sum of five dollars per acre per year for the use thereof.

And the said Akers was to hold the lands and premises until it, the said city of Sonoma, should fail to establish its title as aforesaid thereto.

That the said city of Sonoma has not failed to establish its title as aforesaid, but has established its claim thereto and to all and every part thereof.

That on the 31st day of March, 1880, and since the commencement of this action, the United States issued and delivered to the said city of Sonoma and the trustees thereof a patent to the
8 land and premises in plaintiffs' complaint described.

That the said plaintiffs claim the said described lands by virtue of a patent issued by the United States to Jacob P. Leese, and known as the Huichica patent, and defendants allege that the said patent does not include the said lands and premises, and that if it does the same was made without authority of law.

That the only authority upon which said Huichica patent issued was by virtue of a decree of the circuit court of the United States of California made and entered on the 24th day of December, 1856, and that said decree did not authorize the issue of a patent by the United States for the lands described in plaintiffs' complaint or for any lands on west side of Arroyo Seco, but confined the issuing of such patent to and made the said Arroyo Seco the boundary thereof between the pueblo and said Huichica.

Wherefore defendants pray judgment that the defendants have possession of said lands and premises and that plaintiff take nothing by his action, and that defendants have their costs.

PORTER & RUTLEDGE,
Attorneys for Defendants.

EXHIBIT A.

This agreement, made and entered into this eleventh day of October, A. D. eighteen hundred and sixty, by and between Theo-
9 dore L. Schell, of the one part, and Stephen Akers, of the other, both of the county of Sonoma in the State of California, witnesseth:

First. That the said Akers, for and in consideration of the covenants and conditions hereinafter expressed, doth hereby release to the said Schell the east half of the following-described piece of land, now in the possession of the said Akers—that is to say: Commencing at a stake on the east side of the road leading from Sonoma city to the embarcadero, opposite the house formerly occupied by Kamp, and thence running north eighty-five degrees east with said Kamp's fence 16 and $\frac{13}{100}$ chains; thence north eighty-nine and one-half degrees east eighteen chains; thence east 14.54 chains. All the above distances are on the line of the said Kamp's fence. Thence from the beginning corner again run south 6½ deg. east 26.90 chains; thence north 79 deg. east 48.67 chains; thence north 6½ deg. west 19 chains, which closes the survey, containing 111 acres and 2 rods, run to true meridian, magnetic variation 16 deg. east, according to private survey No. 6, made 17th day of December, A. D. 1857, by John B. Wood, county surveyor of Sonoma county.

The said Schell hereby covenants and agrees that in the event the city of Sonoma establishes her claim to any part or portion of the above-released tract of land that he will deliver the possession of the same, or such portions thereof as may be so established, together with a yearly rent from this date of five dollars per acre for the land so to be delivered; and the said Akers hereby covenants and agrees that in the event of the city of Sonoma not being able to establish her claim beyond the present line of the Huichica patent that he will deliver possession to the said Schell of all or such portion of the remainder of said above-described tract of land as may be within the line of said Huichica patent, and will pay a yearly rent for the same, at the rate of five dollars per acre, to the said Schell.

In witness whereof we herewith set our hands and affix our seals the day and year first written.

STEPHEN AKERS. [SEAL.]
THEO. L. SCHELL. [SEAL.]

Witness:
G. L. WRATTEN.

This instrument was duly acknowledged on the 11th day of October, 1860, and was duly recorded in the office of the county recorder of Sonoma county October 12th, 1860.

Decision of Court.

Superior Court, Sonoma County, California.

HENRY M. HALE *et al.*
vs.
STEPHEN AKERS *et al.*

The court is of the opinion that the contract of the 11th of October, 1860, is conclusive of this controversy. The Huichica patent had issued when that agreement was made and covered the land in

dispute. Plaintiffs' testator had then all the title which he
11 ever could acquire. The parties must have referred to the final location of the patent of the pueblo of Sonoma when they in their agreement used the phrase "in the event the city of Sonoma establishes her claim to any portion" of said land. That patent has been finally located and embraces the land which is the subject of this suit. It follows that the defendant should prevail.

A deed from Thomas O. Larkin to Emanuel Berri and one from E. Berri to Theodore L. Schell were offered by plaintiff and received, subject to defendants' objections. The objections are overruled, the deeds received in evidence, and defendants allowed an exception to the ruling.

Let findings be prepared, and when signed and filed judgment will be entered.

PRESSLEY, *Judge.*

Filed October 15th, 1880.

R. A. THOMPSON, *Clerk,*
By JAMES A. ANDERSON,
Deputy Clerk.

Findings of Fact.

(Title of court and cause.)

This cause above entitled came on regularly for trial on the 26th day of August, 1880, before the court without a jury, a jury trial having been duly waived by the respective parties, W. D. Bliss, Esq., appearing as attorney for plaintiffs, and Porter & Rut-
12 ledge, Esq., for the defendants, and from the evidence introduced the court makes its findings of fact and conclusions of law as follows:

As matter sof fact the court finds—

First.

On the 28th dayof October, 1841, the Mexican Governor of California made a grant to Jacob P. Leese of the place called Huichica, in the neighborhood of Sonoma, embracing all the land between the Arroyo Seco, the Arroyo de los Carneros, and the swamp land, containing two square leagues. The western boundary was the Arroyo Seco.

Second.

This grant was made by the Governor upon the petition of Jacob P. Leese asking for the grant, with the boundaries given and accompanying his petition, and a part thereof was a diseño or map of the grant prayed for, showing the location of the tract and the boundaries and fixing the Arroyo Seco as the western boundary as far down the stream as where it enters the salt marsh. Judicial possession of the said grant was attempted to be given the said Leese on the 14th of February, 1842; but on report thereof to the Gov-

ernor it was by him adjudged to be void, because the land of which judicial possession so given was much more than the quantity granted.

13 Third.

On the 15th day of June, 1844, said Leese presented a second petition to Governor Micheltorena for the said Rancho Huichica. Among other things in this petition, he stated that "as the first diseño presented with his first petition was only an eye sketch, there not being any one at the time who could make a correct map of the land, it therefore had many defects; since although it is true that the boundaries as represented on the first diseño are such as the rancho should have, yet the courses and distances were defective; that the land granted to him contains some four square leagues as ascertained by measurement, and that his grant of 1841 only conveyed him two and a half square leagues. He therefore presents a new diseño, made with all exactitude, by which (he says in his petition) "that the place, instead of containing two square leagues as set forth in the title, in fact contained some four square leagues; and prays a new title be issued to him."

Fourth.

The diseño presented with this second petition included a piece of land on the west side of the Arroyo Seco, lying southeasterly of a line starting at what was then called the "Trancas," on Sonoma creek, and running in a northeast course to the Arroyo Seco; thence up the Arroyo Seco much further than is represented on the first diseño and grant; and also representing the grant prayed for as adjoining the pueblo of Sonoma.

14 Fifth.

Both diseños presented with the foregoing petitions—that is, both the first and second diseño—were the work of skilled and competent draftsmen.

Sixth.

On the sixth of July, 1844, Micheltorena, then Governor of California, in compliance with the second petition of Leese, made to him a second grant of three and a half leagues of the land called "Huichica," bounded on the north by the crossing of the upper road to Napa, on the east by the Arroyo de los Carneros, on the south by the swampy lands on the bay, on the west by Estero de Sonoma, as far as the Trancas, taking the direction of the Arroyo Seco as far as the Little Hills of Huichica. This grant was made subject to approval by the departmental assembly.

Seventh.

The first grant was approved by the departmental assembly in September, 1845. The second grant was never placed before said assembly for approval.

Eighth.

Jacob P. Leese presented, April 6th, 1852, a claim for confirmation of his title to the whole Huichica tract of five and a half leagues to the board of land commissioners created under the act of
15 Congress of March 3d, 1851, to settle private land claims in the State of California. Said claim was confirmed by said board April 18th, 1853, and by the United States district court April 22d, 1856. The appeal to the United States Supreme Court was dismissed December 24th, 1856. No decree respecting said claim was ever made by the circuit court of the United States.

Ninth.

The decree of confirmation contained this clause: "The land of which confirmation is hereby made is known by the name of 'Huichica,' containing five and one-half square leagues, and no more, and is bounded and described as follows, to wit: Bounded on the north by the upper road which goes to Napa, on the east by the Arroyo de los Carneros, on the south by the marshy land adjoining the Bay of San Francisco, and on the west by the Estero of Sonoma, as far as the Trancas, taking the direction (el rumbo direction or course) of the Arroyo Seco."

Tenth.

Under this decree a deputy United States surveyor made a survey of the Huichica in December, 1868, which was approved by the United States surveyor general for the State of California, June 4th, 1859. No notice was given of said survey or of the approval thereof, and neither the city of Sonoma nor any officer thereof nor the
16 defendant had any notice of any proceeding relative to the approval of said survey of Huichica.

Eleventh.

In accordance with said survey a patent for the Huichica rancho, containing 18,704 acres, was issued by the United States to Jacob P. Leese, dated August 3d, 1859, which is in the usual form of patents issued on confirmed Mexican grants. It recites the second grant aforesaid, confirmation by the courts, and said survey. The westerly boundary, as shown on the plat in the patent, is the Sonoma creek, from a post marked L at the lower landing as far as a post marked L at the Trancas; thence a straight line running north 37 degrees east 156 chains to a post marked L on the Arroyo Seco, at the Huichica hills. This last line is known as the "Trancas line."

Twelfth.

Jacob P. Leese, by a quitclaim deed, dated July 8th, 1852, conveyed to Thomas O. Larkin all the Huichica rancho, except a few small lots previously conveyed to other persons. Said Larkin, by a quitclaim deed, dated October 22d, 1853, conveyed to Emanuel

Berri a tract of land, parcel of said rancho, containing 470 acres. Said Berri, by a quitclaim deed dated January 18th, 1859, conveyed to Theodore L. Schell the last-named tract of 470 acres.

Thirteenth.

Theodore L. Schell was a resident of the city and county
17 of San Francisco, died therein December, 1877, leaving a will appointing plaintiffs his executors. Letters testamentary were issued to them in January, 1878, and they have ever since been executors of said Schell.

Fourteenth.

Figueroa, the Mexican Governor of California, on the 24th day of June, 1835, instructed General M. G. Vallejo, director of colonization, to establish the pueblo of Sonoma; and, in pursuance of said instructions, said Vallejo in the same year established said pueblo within the present county of Sonoma and made a survey thereof, with the following boundaries: On the east the Arroyo Seco, from the vineyard of Salvador Vallejo to the salt marsh on the bay; thence along the salt marsh westerly to Sonoma creek; thence up said creek to the Agua Caliente creek; thence easterly by the hills north of the city to place of beginning.

Fifteenth.

This tract General Vallejo, under the order of Governor Figueroa aforesaid, laid out and platted into lots and blocks and established families on the same, occupying the tract along the Arroyo Seco, in 1835, down to the point where it entered the salt marsh aforesaid. General Vallejo made a report of all his said proceedings to the Mexican Governor of California, who duly approved all of his acts done in the premises.

18 Sixteenth.

The mayor and common council of the city of Sonoma, on the 21st day of May, 1852, presented to the board of land commissioners aforesaid their claim, as successors of the pueblo, for all the land of the pueblo of Sonoma as established by Vallejo. Their claim was confirmed by said board January 22d, 1856; an appeal was taken to the United States district court, and pending said appeal the case was transferred, under provisions of an act of Congress approved July 1st, 1864, to the United States circuit court for the northern district of California, and the claim was confirmed by that court November 2d, 1864. These decrees fixed the Arroyo Seco, from the vineyard aforesaid to the salt marsh, as the eastern boundary of the pueblo.

Seventeenth.

The United States surveyor general for the State of California, in September, 1868, made a survey of said lands and reported the same to the Land Department of the United States for approval on the 14th

day of August, 1872. Due and proper notice thereof was given and published in accordance with the said act of Congress of July, 1864; and the matter coming on to be heard before the Commissioner of the General Land Office on the 8th day of March, 1876, that officer adjudged and determined, on a conflict arising before him
19 on the approval of said survey as to the location of the southeasterly line, being the boundary common to the said lands confirmed as aforesaid to the city of Sonoma and the lands known as the "Huichica grant," that such boundary should be established as follows: "A direct line running from the point marked 'Trancas,' on Sonoma creek, to the point where the Arroyo Seco enters the salt marsh (Station No. 43 in the amended survey of Rancho Huichica), and thence following the direction of the Arroyo Seco to the Little Huichica Hills, should constitute the southeasterly boundary of the pueblo of Sonoma;" and directed the said surveyor general to make survey of the said confirmed claim of the said city of Sonoma in accordance with said decision.

Eighteenth.

In pursuance thereof the said surveyor general made an amended survey of said lands, due notice thereof being given as prescribed by said act of Congress of July 1st, 1864, and amendments thereto; and the said surveyor general having, on the 5th day of December, 1878, reported to the United States General Land Office all his proceedings in the matter of the resurvey as aforesaid, together with the plat of said resurvey, the objections thereto, the testimony produced before him, the argument of counsel, and the previous record therein, upon a hearing had before the Commissioner of the General
20 Land Office, upon due published notice thereof on said resurvey and objections made thereto, the said Commissioner approved the said resurvey and the said former decision of the said Commissioner of March, 1876, fixing the Arroyo Seco as the boundary between the said pueblo of Sonoma and Huichica grant. No appeal was taken from this decision, and the same became final.

Nineteenth.

A patent for said pueblo lands was issued by the United States to the mayor and common council of the city of Sonoma, dated March 31st, 1880, in accordance with the decrees of confirmation and survey, containing 6,063.95 acres. The plat in the patent shows that it covers 423 acres of land embraced in the Huichica patent, being the tract bounded by the "Trancas line," so called, running from post L at the Trancas north 37 deg. east 156 chains to post L, on the Arroyo Seco, by the Arroyo Seco from said post to where it enters the marsh at station 43 aforesaid, and by a line from said station south 70 deg. 45 min. west 81.50 chains to post L at the Trancas.

Twentieth.

The defendant, Stephen Akers, entered into possession of the land described in plaintiffs' complaint under a contract with the city of

Sonoma to purchase the same in 1851, and has occupied the same ever since; that on the 13th day of May, 1858, the said city
21 of Sonoma duly conveyed to the said Stephen Akers, by a good and sufficient deed of conveyance, 111 acres of land within the limits of said city, as the same was confirmed and patented as aforesaid, and the land sued for is a part of the said one hundred and eleven acres so conveyed to said Stephen Akers, and he has continued to reside upon, cultivate, and improve the same and the whole thereof up to October 11th, 1860, and resided upon, cultivated, and improved the west part of said tract so conveyed to him, including the portion sued for by the plaintiffs, ever since 1851.

Twenty-first.

On the 12th day of September, 1860, the said Theodore Schell, then living, brought suit in the seventh district court of this State for the county of Sonoma against the said Akers to recover all of said tract of land, claiming title thereto under the said Huichica patent, and the said Akers, by his answer in said action, claimed title and possession to the whole thereof under his said deed from the said city of Sonoma, and whilst said action was pending and on the 11th day of October, 1860, the said Akers and Schell made the following agreement in writing, to wit:

(Here follows the agreement in the answer, marked Exhibit A, fols. 23 to 28.)

Twenty-second.

That upon the execution of said contract the said Theodore
22 L. Schell dismissed said action on the 12th day of October, 1860, and the fence was built by the parties from the lane mentioned in the complaint, extending northerly across the said 111-acre tract and dividing it into two fields of nearly equal size, and Akers surrendered to Schell the possession of all that portion of the 111-acre tract lying east of said fence and embracing about fifty acres, and retained the possession of all the land on the west side of said fence.

Twenty-third.

The Trancas line, being the western boundary of the line patented as aforesaid to Leese, divides the said 111-acre tract into two three-cornered pieces, the line running from the southwest to the northeast and crossing the said fence, leaving a portion within the Huichica patent on the west side of the fence in the possession of Akers, and also leaving a portion on the east side of the fence, not embraced within the patent of the Huichica, in the possession of the said Schell, held by him under the said contract.

Twenty-fourth.

On the 28th day of July, 1879, the plaintiffs served upon defendants a demand in writing for the surrender of the possession of the

land described in the complaint, and defendants thereupon refused to surrender to plaintiffs any portion of said land.

23 Twenty-fifth.

A piece of land described as follows: Beginning at a point on the northerly line of the lane leading from the house of Theodore L. Schell, deceased, westerly to the road commonly called "Broadway," 7.63 chains easterly from the intersection of said lane and road, the point where the Trancas line crosses said lane; thence north 37 deg. east along the Trancas line to a point where the said Trancas line crosses the fence heretofore constituting the division fence between Akers and Schell; thence south 5 deg. 45 min. east along said fence to the said lane; thence westerly along the northerly side of said lane 15.61 chains to the place of beginning—is included within the land described in the complaint.

Said piece of land is suituated between the Arroyo Seco and the Trancas line, and is within the boundaries described in the grant of the Huichica rancho of July 6th, 1844; the decrees of confirmation, the surveys and the patent thereof mentioned in findings 8, 9, 10, and 11; also the three deeds mentioned in finding 12, and is not within the exceptions mentioned in the first of said deeds.

Said piece of land is also within the boundaries of the pueblo of Sonoma, established by Vallejo; the decrees of confirmation, the final survey, and the patent of said pueblo, mentioned in findings 14, 16, 17, 18, and 19; also of the 111-acre tract mentioned in
24 finding 20th, and is on the west side of the fence mentioned in finding 22d.

As a matter of law I find—

That the city of Sonoma has established its claim to the land in controversy within the meaning of the said contract between Schell and Akers.

That by the terms of said contract each agreed with the other to abide by the decision of the United States on the said claim of the city of Sonoma for said lands as then pending before the United States courts, and to abide by the boundary line between them as established on the final confirmation of pueblo lands to the city of Sonoma.

That defendant, Stephen Akers, is entitled to the possession of all the lands and premises described in the complaint.

That all the right, title, and interest of Jacob P. Leese in and to all the piece of land described in finding 25, derived to him under the patent of the Huichica rancho, passed to and became vested in Theodore L. Schell on the 18th day of January, 1859.

That all the title of the city of Sonoma passed to and became vested in Stephen Akers, by deed dated May 13th, 1858, in and to the said tract described in said finding 25th.

That defendants are entitled to judgment for the possession of all the land described in plaintiffs' complaint, with costs of suit. Let judgment be entered accordingly.

JNO. G. PRESSLEY,
Superior Judge.

25 *Judgment.*

(Title of court and cause.)

This cause came on regularly for trial on the 26th day of August, A. D. 1880, William D. Bliss, Esq. appearing as counsel for the plaintiffs, and Porter & Rutledge, Esqs., for the defendants. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court, sitting without a jury, whereupon witnesses on behalf of the plaintiffs and the defendants were sworn and examined; the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of law and the findings aforesaid, it is ordered, adjudged, and decreed that Stephen Akers and Montgomery Akers, the defendants, do have and recover of and from Henry M. Hale and Georgiana L. Schell, executors of the will of Theodore L. Schell, deceased, the plaintiffs, the sum of ($56.85) fifty-six $\frac{85}{100}$ dollars, with interest thereon at the rate of seven per cent. per annum from the date hereof until paid, costs and disbursements incurred in this action.

Judgment entered June 20th, A. D. 1881.

26 *Notice of Appeal.*

(Title of court and cause.)

To the clerk of said superior court and to Messrs. Porter and Rutledge, attorneys for defendants:

Notice is hereby given that the plaintiffs in the above-entitled action hereby appeal to the supreme court of this State from the judgment rendered and entered in said action in said superior court on the eighth day of January, 1881, in favor of the defendants in said action and against the said plaintiffs, and from the whole thereof.

Dated Petaluma, July 12th, 1881.

WILLIAM D. BLISS,
Attorney for Plaintiffs.

Stipulation.

(Title of court and cause.)

It is stipulated between the parties hereto that the foregoing printed pages contain full, true, and correct copies of the complaint, amended answer, decision, findings of fact and law, judgment, and notice of appeal.

And it is further stipulated that the same constitute the transcript

on appeal in this cause, and that a good and sufficient undertaking on appeal has been properly and duly filed herein.

THOS. RUTLEDGE,
Att'y for Def't.
WILLIAM D. BLISS,
Plaintiffs' Attorney.

27 Service accepted by copy this 28th day of October, A. D. 1881.

THOS. RUTLEDGE,
Att'y for Respondents.

I, R. A. Thompson, county clerk of Sonoma county, hereby certify that Wm. D. Bliss, Esq., attorney for appellants, left with me a copy of the within transcript for the Hon. John G. Pressley, superior judge, Sonoma county.

R. A. THOMPSON,
County Clerk.

28 *Submission of Cause.*

In the Supreme Court, State of California, Department Two.

AKERS *et al.*
vs.
HALE *et al.* } 8099.

1886, March 26th. Ordered cause stand. Submitted.

THE COURT.

(Title of court and cause.)

1886, April 9th. Filed petition for rehearing.

Title of court and cause.

1886, April 24th. Rehearing denied.

THE COURT.

29 In the Supreme Court of the State of California, Department Two.

No. 8099.

Judgment.

HENRY M. HALE and GEORGIANA L. SCHELL, Executors of the Will of Theodore L. Schell (Deceased), Appellants, *vs.* STEPHEN AKERS *et al.*, Respondents.	On Appeal from the Superior Court in and for the County of Sonoma.

And now, at this day, this cause being called, and having been heretofore submitted and taken under advisement, and all and singular the law and premises having been fully considered, the opinion of the court herein is delivered by the court.

Whereupon it is adjudged and decreed by the court that the judgment of the superior court in and for the county of Sonoma in the above-entitled cause be, and the same is hereby, affirmed with costs.

[Endorsed:] No. —. In the supreme court, State of California. Remittitur. —— —— *vs.* —— ——. Clerk's costs, $—; paid by appellant, $—; paid by respond't, $—; total, $—. —— ——, clerk; by —— ——, deputy.

30 *Opinion.*

In the Supreme Court of the State of California, Department Two.

(Filed March 26, 1886.)

HALE *et al.* *vs.* AKERS *et al.* } No. 8099.

This is an action to recover possession of about fifteen acres of land in Sonoma county. Both parties claim title in fee. The plaintiffs deraign their title from Jacob P. Leese, to whom a Mexican grant of five and a half leagues was confirmed, and in August, 1859, patented by the United States. The defendant, Stephen Akers, deraigns his title from the city of Sonoma, to which a patent was issued by the United States in March, 1880, for certain lands confirmed to it as pueblo lands. Both patents cover the land in controversy, and the question for decision is which party shows the better right to it.

The facts as found by the court below are as follows:

In October, 1841, the Governor of California made a grant to Jacob P. Leese of the place called Huichica, in the neighborhood of Sonoma, containing two square leagues and having for its western boundary the Arroyo Seco. In July, 1844, the Governor made a second grant to Leese of three and a half leagues of the land called Huichica, and bounded "on the west by Estero de Sonoma as far as the Trancas, taking the direction of the Arroyo Seco as far as the Little Hills of Huichica."

In April, 1852, Leese presented to the board of land commissioners a claim for confirmation of his title to the whole Huichica tract of five and a half leagues, and his claim was confirmed by the board in April, 1853, and by the United States district court in 1856. The appeal to the supreme court was dismissed in December, 1856. The decree of confirmation gave to Leese the land known by the name of "Huichica," containing five and one-half square leagues, and bounded it "on the south by the marshy land adjoining the Bay of San Francisco and on the west by the Estero of Sonoma as far as the Trancas, taking the direction (el rumbo, direction or course) of the Arroyo Seco." Under this decree a deputy surveyor made a survey of the Huichica in December, 1858, and his survey was approved by the U. S. surveyor general for the State on June 4, 1859. No notice was given of the survey or of its approval, and neither

the city of Sonoma nor any officer thereof nor the defendant had any notice of the proceeding relative to its approval. In accordance with this survey a patent for the Huichica rancho was issued by the United States to Leese, dated August 3, 1859. It was in the usual form of patents issued for confirmed Mexican grants and recited the second grant, the confirmation, and the survey. The western boundary, as shown on the plat in the patent, is the Sonoma creek, from a post marked L, at the Lower Landing, as far as a post marked L at the Trancas, and thence a straight line running north 37 degrees east 156 chains to a post marked L on the Arroyo Seco, at the Huichica hills. This last line is known as the "Trancas line."

In June, 1835, the Governor of California instructed Gen. Vallejo, director of colonization, to establish the pueblo of Sonoma, and in that year Vallejo established the pueblo and made a survey thereof with the following boundaries: "On the east the Arroyo Seco from the vineyard of Salvador Vallejo to the salt marsh on the bay; thence along the salt marsh westerly to Sonoma creek; thence up that creek to the Agua Caliente creek; thence easterly to the foothills north of the city to the place of beginning." This tract Gen. Vallejo laid out and platted into lots and blocks, and in the year 1835 established families on the same, occupying the tract along the Arroyo Seco down to the point where it entered the salt marsh. He also made a report of all his proceedings to the Governor, and they were duly approved.

In May, 1852, the mayor and common council of the city of Sonoma presented to the board of commissioners their claim, as successors of the pueblo, for all the land of the pueblo of Sonoma as established by Vallejo, and their claim was confirmed by the board in January, 1856. An appeal was taken to the district court and, under the provisions of an act of Congress passed July 1, 1864, the case was transferred to the circuit court, where the claim was confirmed on the 2d day of November, 1864. The decree of confirmation fixed the Arroyo Seco as the eastern boundary of the pueblo.

In September, 1868, a survey of the land so confirmed was made by the surveyor general, and in August, 1872, was reported to the land department for approval. Due notice of this survey was given and published, as required by the act of Congress of July 1, 1864, and the matter of the conflict between this survey and the survey of the Huichica grant was heard before the Commissioner of the General Land Office in March, 1876. That officer adjudged and determined that "a direct line running from the point marked 'Trancas,' on Sonoma creek, to the point where the Arroyo Seco enters the salt marsh, and thence following the direction of the Arroyo Seco to the Little Huichica hills, should constitute the southeasterly boundary of the pueblo of Sonoma," and directed the surveyor general to amend his survey accordingly. An amended survey was made as required and due notice thereof given. The amended survey was reported to the General Land Office for approval, and, upon a hearing had before the Commissioner in December, 1878, that officer approved the survey and fixed the Arroyo Seco as the

boundary between the pueblo of Sonoma and the Huichica grant. No appeal was taken from this decision and the same became final. A patent for the pueblo lands was issued by the United States to the mayor and common council of the city of Sonoma in accordance with the decrees of confirmation and survey, dated March 31, 1880, and this patent covered 423 acres of land embraced in the Huichica patent, of which the fifteen acres in controversy are a part.

In 1851 the defendant, Stephen Akers, entered into the possession of the land sued for, under a contract with the city of Sonoma, for its purchase, and he has remained in possession, cultivating and improving it, ever since. In May, 1858, the city conveyed to him this land and enough more to make 111 acres, it all being within the city limits as surveyed and patented.

In January, 1859, the grantee of Leese conveyed to Theodore L. Schell, the plaintiffs' testator, 470 acres of land, parcel of the Huichica grant, as surveyed and covering the 111 acres conveyed as aforesaid to Akers.

In September, 1860, Schell commenced an action against Akers to recover from him the possession of all the 111 acres, and while the action was pending the parties to it on the 11th day of October following entered into a written agreement, which was signed and acknowledged by them and recorded. By this agreement Akers released to Schell the east half of the 111-acre tract, which was described by metes, bounds, and the agreement then proceeded as follows:

"The said Schell hereby covenants and agrees that in the event the city of Sonoma establishes her claim to any part or portion of the above-released tract of land that he will deliver the possession of the same or such portions thereof as may be so established, together with a yearly rent from this date of $5 per acre for the land so to be delivered; and the said Akers hereby covenants and agrees that in the event of the city of Sonoma not being able to establish her claim beyond the present line of the Huichica patent that he will deliver possession to the said Schell of all or such portion of the remainder of said above-described tract of land as may be within the line of said Huichica patent, and will pay a yearly rent for the same at the rate of $5 per acre to the said Schell."

The action was then dismissed and a fence was built by the parties extending northerly across the land and dividing it into two fields of nearly equal size. Akers surrendered to Schell all that portion lying east of the fence and retained possession of all that portion lying west of it.

The land in controversy here is a part of the land which Akers so retained in his possession.

Upon the findings the court rendered judgment in favor of the defendants. The plaintiffs appealed and the case is brought here on the judgment-roll.

There are two sufficient answers to the claims made by the appellants:

1. It was expressly provided by the act of Congress passed March

3, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," that the final decrees of the board of commissioners or of the district or supreme court or any patent to be issued under the act should be conclusive only between the United States and the claimants, and should not affect interests of third persons. (Rodrigues *vs.* United States, 1 Wall., 588.)

It has been held by this court that the "third persons," against whose interests the action of the Government and patent are not conclusive, are those whose title accrued before the duty of the Government and its rights under the treaty attached. (Teschmacher *vs.* Thompson, 18 Cal., 27.)

31 Where two patents cover the premises in controversy "the main question in the case, as in all cases where patents founded upon previously existing concessions overlap, is which of the two original concessions carried the better right to the premises." This was said in Henshaw *vs.* Bissell (18 Wall., 355), and in that case, there being two patents covering the same land, it was held that in determining such a controversy a grant of land identified by specific boundaries or having such descriptive features as to render its identification a matter of absolute certainty gives a better right to the premises than a floating grant, although such floating grant be first surveyed and patented.

Here it appears that the pueblo of Sonoma was established by the direction and with the approval of the Governor of California in 1835. Its boundaries were surveyed and fixed. The tract was laid out in lots and blocks and families were established upon those lots and blocks along the Arroyo Seco, which was the eastern line down to the salt marsh.

"By the laws of Mexico, in force at the date of the acquisition of the country, pueblos or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of lands constituting the site of such pueblos and towns and of adjoining lands within certain prescribed limits. This right appears to have been common to the cities and towns of Spain from an early period of her history, and was recognized in the laws and ordinances for the settlement and government of her colonies on this continent. Those laws and ordinances provided for the assignment to the pueblos or towns, when once established and officially recognized, for their use and the use of their inhabitants, of four square leagues of land." (Townsend *vs* Greeley, 5 Wall., 386.) And when pueblos were established they became invested, even without any formal assignment, with a certain title to the pueblo lands. This title was recognized by the act of March 3, 1851, as in the nature of a grant, and it has ever since been upheld and protected by the decisions of this court as of the Supreme Court of the United States. (Hart *vs.* Burnett, 15 Cal., 530; Grisar *vs.* McDowell, 6 Wall., 363.)

In the first grant to Leese the Arroyo Seco is expressly named as its western boundary. In the second grant and in the decree of confirmation the western boundary is the Estero de Sonoma as far as the Trancas, thence taking the direction of the Arroyo Seco.

It has been held, when a land claim had been confirmed by a decree of the district court, under the act of March 3, 1851, and the decree fixed the boundaries of the claim and remained unreversed, that the survey must conform to the decree in all respects. (The Fossat case, 2 Wall., 649.)

What was meant by the words "taking the direction of the Arroyo Seco?" It seems to us, as it did to the Commissioner of the General Land Office, when the matter of the conflict was before him, that the line was to run from the Trancas to the nearest point on the Arroyo Seco, and thence up that creek or gulch. If this be so, then it is clear that the line as run by the surveyor did not conform to the decree, but took in lands not covered by it. It must follow that to the lands so taken in the original concession to the pueblo and the patent issued upon confirmation thereof carried the better right.

2. When Schell and Akers executed their written agreement in October, 1860, the Huichica patent had been issued to Leese and Schell had his deed. The Sonoma claim had been confirmed by the commissioners and took in the land lying between the Trancas line and the Arroyo Seco. The city was asserting a right to that land, and the case was pending before the courts.

Akers had a deed to 111 acres of the land and was in possession of it. Under these circumstances the parties compromised the action, which had been commenced, by dividing the 111 acres about equally between them. Akers released and surrendered to Schell the eastern half and retained the western half. In consideration of this Schell agreed, "in the event the city of Sonoma establishes her claim to any part or portion" of the land released, to deliver back to Akers such part or portion and to pay a yearly rent of $5 per acre for the same while he might hold it, and Akers agreed, in the event the city should not be able to establish her claim beyond the line of the Huichica patent, to deliver to Schell so much of the land as he retained within that line and to pay to him a like rent of $5 per acre.

It is clear from this, we think, that the only establishment of the Sonoma claim which the parties contemplated was such as would result from the action of the courts upon it and the issuing of a patent by the Government in pursuance of their decrees. The parties evidently thought that if the city should finally succeed in establishing its claim and receive a patent for any of the land within the lines of the Huichica patent it would have the better title to the land. They could, therefore, avoid litigation and expense and safely await the issue of the city's contest. As we have seen, they rightly interpreted the law, and so long as Schell lived he acquiesced in the arrangement. After his death his executors thought it their duty to raise the question again, and this action was commenced.

In our opinion the agreement was intended to be, and was, bind-

ing upon the parties and decisive of their rights when it was executed, and it remains so still.

The judgment should be affirmed.

BELCHER, *C. C.*

We concur:
SEARLS, *C.*
FOOTE, *C.*

By the COURT: For the reasons given in the foregoing opinion the judgment is affirmed.

32 *Assignment of Errors.*

In the Supreme Court of the United States.

HENRY M. HALE and GEORGIANA L. SCHELL, Executors of the Will of Theodore L. Schell, Deceased, Plaintiffs in Error,
vs.
STEPHEN AKERS and MONTGOMERY AKERS, Defendants in Error.

Writ of error from the supreme court of the State of California to the Supreme Court of the United States.

The judgment in department two of the supreme court of the State of California was rendered and filed on the 6th day of March, 1886, whereupon the appellants in said court, the plaintiffs in error in this court, filed their petition for a rehearing by said su-
33 preme court in bank, which petition was denied on the 26th day of April, 1886, whereby the judgment of said court became final.

The plaintiffs claim that their testator, Theodore L. Schell, was the owner of a piece of land situated in the county of Sonoma, in the State of California, and a portion of the Huichica ranch.

They claimed that their said testator had title to said land under a grant made in June, 1844, by the Mexican Governor of California to one Jacob P. Leese, and the subsequent confirmation of the claim of Leese by the board of land commissioners and the United States district court for the northern district of California, in accordance with the provisions of an act of Congress of the United States passed March 3rd, 1851, entitled "An act to ascertain and settle the private land claims in the State of California," sections 1, 8, 9, 10, 11, and also under the survey of said rancho and a patent therefor issued by the United States to said Leese, dated August 3rd, 1859, in accordance with the provisions of sections 13 and 15 of said
34 act, and the judgment and decision of said court was against the title so claimed and set up by plaintiffs.

The plaintiffs also claimed that said Jacob P. Leese and their said testator holding under him had right and title to the land in controversy under the provisions of the treaty made between the Government of the United States and the Republic of Mexico on the

second day of February, 1848, and that the decision and judgment of said court was against the right and title so set up and claimed by plaintiffs.

And now come the said Henry M. Hale and Georgiana L. Schell, executors as aforesaid, plaintiffs and appellants in said cause and plaintiffs in error in this court, by William D. Bliss, their attorney, and assign here the following errors, which were committed by
35 said supreme court of the State of California by and in the judgment in said cause to the prejudice of plaintiffs:

1. The supreme court of the State of California erred in deciding and adjudging that the patent issued by the United States to Jacob P. Leese, dated August 3rd, 1859, for the Huichica rancho was not as against the city of Sonoma conclusive evidence of the boundaries of said rancho.

2. Said court erred in adjud-ing that a portion of the western boundary of the Huichica rancho, known as the "Trancas line," as the same was run by the surveyor general of the United States and as shown on said patent, did not conform to the decree of confirmation of the claim of Leese for said rancho by the United States district court for the northern district of California, made April 22, 1856.

3. Said court erred in adjudging that the patent issued by the United States to the mayor and common council of the city
36 of Sonoma, dated March 31, 1880, established that the title to the land in controversy in this action was in the defendants, and that it gave to defendants a title and right to said land superior to the title of plaintiffs thereto under the patent issued to Leese, dated August 3, 1859.

4. Said court erred in adjudging that plaintiffs' testator, Schell, and the defendant Akers, in executing their written agreement, dated October 11th, 1860, contemplated or intended that in case any patent should be thereafter issued to the city of Sonoma conveying any portion of the land to which Schell then had title under the Huichica patent aforesaid, issued August 3rd, 1859, such subsequently issued patent would or could divest said Schell of his title to said land under said Huichica patent or could establish that the superior title to said land was vested in the city of Sonoma.

37 Wherefore these plaintiffs pray that for these errors the judgment of the supreme court of the State of California against them may be reversed by this court and that a judgment be entered in their favor.

WILLIAM D. BLISS,
Attorney for Plaintiffs in Error.

(Endorsed:) Filed September 2nd, 1886. J. D. Spencer, clerk, by J. S. Williams, deputy.

38 *Bond.*

In the Supreme Court of the United States.

HENRY M. HALE and GEORGIANA L. SCHELL, Executors of the Will of THEODORE L. Schell, Deceased, Plaintiffs in Error,
versus
STEPHEN AKERS and MONTGOMERY AKERS, Defendants in Error.

Know all men by these presents that we, Georgiana L. Schell and Fred. A. Schell, are held and firmly bound unto Stephen Akers and Montgomery Akers, defendants in error herein, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said Stephen Akers and Montgomery Akers, their heirs, executors, and administrators and assigns:

To the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our
39 heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the seventh day of May, 1886.

Whereas the above-named Henry M. Hale and Georgiana L. Schell, executors of the will of Theodore L. Schell, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the supreme court of the State of California in the cause entitled Henry M. Hale and Georgiana L. Schell, executors of the will of Theodore L. Schell, deceased, *versus* Stephen Akers and Montgomery Akers:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

GEORGIANA L. SCHELL. [SEAL.]
FRED. A. SCHELL. [SEAL.]

40 UNITED STATES OF AMERICA,
District of California, City and County of California:

Georgiana L. Schell and Fred. A. Schell, being duly sworn, each for himself deposes and says that he is a freeholder in said district and is worth the sum of five hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

GEORGIANA L. SCHELL.
FRED. A. SCHELL.

Subscribed and sworn to before me this 7th day of May, 1886.

[SEAL.] J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

The within bond is hereby approved by me this 7th day of May, 1886.

R. F. MORRISON,
Chief Justice of California.

(Endorsed:) Filed May 8th, 1886. J. D. Spencer, clerk, by J. S. Williams, deputy.

41 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Stephen Akers and Montgomery Akers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 11th day of October, A. D. 1886, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of California, wherein Henry M. Hale and Georgiana L. Schell, executors of the will of Theodore L. Schell, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of California.

Witness the Honorable Robert F. Morrison, chief justice of the supreme court of the State of California, this 7th day of May, A. D. 1886, and of the Independence of the United States the one hundred and tenth.

R. F. MORRISON,
Chief Justice of California.

41½ [Endorsed:] 8099. In the Supreme Court of the United States. Henry M. Hale and Georgiana L. Schell, ex'rs, &c., pl'ffs in error, *vs.* Stephen Akers and Montgomery Akers, def'ts in error. Citation. Filed June 17th, 1886. J. D. Spencer, clerk, by Frank Myers, deputy.

Service of the within citation is hereby accepted this tenth day of May, 1886.

RUTLEDGE & McCONNELL,
Attorneys for Defendants in Error.

42 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the justices of the supreme court of the State of California, Greeting:

Because in the record and proceedings, and also in the rendition

of the judgment of a plea which is in the said supreme court, before you, between Henry M. Hale and Georgiana L. Schell, executors of the will of Theodore L. Schell, plaintiffs in error, and Stephen Akers and Montgomery Akers, defendants in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said U. S. Supreme Court to be there and then held, that, the record and proceedings aforesaid be [being] inspected, the said U. S. Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of May, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

The Seal of the Circuit Court, District of Cala.

L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the District of California.

The above writ of error is hereby allowed.
R. F. MORRISON,
Chief Justice of California.

42½ [Endorsed:] United States Supreme Court. Henry M. Hale and Georgiana L. Schell, ex'rs, &c., pl'ffs in error, *vs.* Stephen Akers and Montgomery Akers, def'ts in error. Writ of error. Filed May 8, 1886. J. D. Spencer, clerk, by J. S. Williams, deputy.

43 In the Supreme Court of the State of California.

HENRY M. HALE and GEORGIANA L. SCHELL, Executors, etc., Plaintiffs in Error,
vs.
STEPHEN AKERS *et al.*, Defendants in Error.

I, J. D. Spencer, clerk of the supreme court of the State of California, do hereby certify that the foregoing forty-two (42) pages, numbered from one to forty-two, both numbers inclusive, contain a full, true, and correct transcript of the proceedings in the cause

above entitled, and that the same together constitute the return to the annexed writ of error.

Seal Supreme Court of California.

Witness my hand and the seal of the said supreme court this 7th day of September, 1886.

J. D. SPENCER, *Clerk.*
FRANK MYERS, *Deputy.*

Endorsed on cover: California supreme court. No. 270. Henry M. Hale & Georgiana L. Schell, executors of Theodore L. Schell, plaintiffs in error, *vs.* Stephen Akers and Montgomery Akers. Filed November 19, 1886.